



38 CFR Part 21

RIN 2900-AQ89

State Approving Agency Jurisdiction Rule

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend existing regulations to clarify State Approving Agencies' (SAA) jurisdiction for approval of online distance learning courses and distinguish such courses from "traditional classroom" resident training courses and independent study-resident training courses (also known as "hybrid" courses), which are typically a combination of online and traditional training. Additionally, VA seeks to clarify SAA authority and jurisdiction with regard to approval and disapproval of any course, or licensing or certification test, and to clarify the adjudicatory outcomes available to an SAA when reviewing an approval application for any type of course (i.e., approval, denial of an application for approval, suspension of approval, or withdrawal of approval).

DATES: Comments must be received by VA on or before [Insert date 60 days after date of publication in the *FEDERAL REGISTER*].

ADDRESSES: Comments may be submitted through www.Regulations.gov. Comments should indicate that they are submitted in response to RIN 2900-AQ89 – State Approving Agency Jurisdiction Rule. Comments received will be available at [regulations.gov](https://www.regulations.gov) for public viewing, inspection or copies.

FOR FURTHER INFORMATION CONTACT: Cheryl Amitay, Chief, Policy and Regulation Development Staff (225C), Education Service, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9800. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: Currently, for purposes of determining SAA jurisdiction, VA's regulation divides courses into residential courses offered in the same state as the state in which the educational institution is located, 38 CFR 21.4250(a)(1), residential courses offered in one state by an educational institution located in a different state, § 21.4250(a)(2), and courses offered by independent study or correspondence, § 21.4250(a)(3). Current § 21.4250(a)(3) provides that if an educational institution offers a program through independent study or by correspondence, only the SAA for the State where the school's main campus is located may approve the course for VA training. This rule, however, does not explicitly address online distance learning courses. Some stakeholders have thus erroneously concluded that this rule does not address the appropriate SAA of jurisdiction for online distance learning programs. VA views online distance learning as a subset of courses offered through independent study and, therefore, views current § 21.4250(a)(3) as controlling which SAA has jurisdiction to approve a course offered via online distance learning, i.e., the SAA for the State in which the school's main campus is located has exclusive jurisdiction over the approval of online distance learning programs.

The relationship between independent study and online distance learning is further clarified in 38 CFR 21.4267(b). VA defines independent study in that section for the purposes of educational assistance programs as a program that "consists of a prescribed program of study with provision for interaction between the student and [instructor] . . . through use of communications technology, including . . .

videoconferencing, computer technology (to include electronic mail), and other electronic means” and is “offered without any regularly scheduled, conventional classroom or laboratory sessions.” 38 CFR 21.4267(b)(1)(i) and (ii). The definition provided for independent study encompasses distance learning in VA’s view, which includes courses offered online. Therefore, online distance learning is currently classified as independent study for the purposes of VA educational assistance programs. Consequently, when current § 21.4250(a)(3) states that the SAA for the State where the educational institution’s main campus is located is the SAA of jurisdiction for the approval of independent study program, it is likewise stating that such SAA is the SAA of jurisdiction for the approval of online distance learning programs.

Nevertheless, stakeholders have informed VA that the connection between “independent study” in § 21.4250(a)(3) and the definition of that term in § 21.4267(b)(1), which incorporates online distance learning, is not apparent to them. Therefore, even though § 21.4250(a)(3) already addresses the appropriate SAA jurisdictional rules for independent study in VA’s view, and § 21.4267(b)(1)(i) and (ii) appropriately classifies online distance learning as independent study for the purposes of VA educational assistance, VA proposes to amend § 21.4250(a)(3) to explicitly include the term “online distance learning.” Such an amendment would not substantively change the current definitions. Rather, it is proposed to curtail confusion among some SAAs and educational institutions while maintaining the status quo.

Furthermore, we propose to also include the qualifier “solely” to the type of courses addressed in our proposed amendment to § 21.4250(a)(3). The qualifier “solely” is appropriate and preferable to avoid confusion regarding jurisdiction for SAA evaluation of any training that is not solely through independent study (including online distance learning), correspondence, or any combination of independent study (including online distance learning) and correspondence. Unless training is offered “solely” via

independent study (including online distance learning), correspondence, or any combination of independent study (including online distance learning) and correspondence, it is addressed in either § 21.4250(a)(1), or (2). Current paragraph (a)(1) addresses “traditional classroom” resident training and independent study-resident training, also known as “hybrid” training, which VA considers resident training for the purpose of VA approval when the resident training is offered in the same state in which the educational institution is located. Current and proposed paragraph (a)(2) addresses residential courses offered in one state by an educational institution located in a different state and “hybrid” training when the resident training is offered in one state by an educational institution located in a different state. VA defined “resident training” and “independent study-resident training” for purposes of the Selected Reserve Educational Assistance Program in 38 CFR 21.7520(b)(22) and (12), respectively, but generally understands those terms as they are defined in that section. The distinction between courses offered exclusively by independent study and those offered in part by independent study is also addressed in § 21.4267. Section 21.4267(b)(1) defines courses offered “entirely by independent study,” while § 21.4267(b)(2) defines courses offered “in part by independent study.” VA intends for § 21.4250(a)(1) or (2) to control jurisdiction unless the course is offered exclusively through independent study (including online distance learning), correspondence, or a combination of independent study (including online distance learning) and correspondence. If offered solely via independent study (including online distance learning), correspondence, or a combination of these methods, only the SAA for the state where the educational institution’s main campus is located may approve independent study (including online distance learning), correspondence, and courses provided via a combination of independent study (including online distance learning) and correspondence, in accordance with § 21.4250(a)(3).

Additionally, current § 21.4250(b)(3), titled “Failure to act,” states that an SAA can respond to a school’s application for program approval by issuing a notice to the school that the SAA does not intend to act on the school’s application, and the school may, instead, request approval from the Secretary. Issuance of such a notice is not a program denial but rather serves as an attempted abdication of the SAA’s prescribed role in 38 U.S.C. 3672(a)(1) and for which SAAs are reimbursed under 38 U.S.C. 3674(a)(1). Therefore, VA proposes to remove this exception and to require an SAA with jurisdiction to approve or disapprove any course for which a VA beneficiary seeks to use his or her VA educational benefits. However, expressly eliminating the authority of an SAA to take no action on an application arguably creates ambiguity as to what an SAA should do when a school submits an incomplete, insufficient, or otherwise unapprovable application, or when the SAA lacks jurisdiction to make a determination on the application. In those cases, the SAA should deny the application – an implicit authority VA views as naturally and obviously arising as the alternative to the explicit authority to approve an application. While SAAs already have this authority in VA’s view, some SAAs have expressed a belief that they lack the authority to issue a denial of approval because that term is not specifically mentioned in any regulatory section.

To remove any potential ambiguity, VA proposes to amend § 21.4250(b) by removing the language currently following the heading “State approving agencies” and adding language to explicitly list “Approval of an Application for Approval,” “Denial of an Application for Approval,” “Suspension of Approval,” and “Withdrawal of Approval” as the four types of decision an SAA is authorized to make under 38 U.S.C. 3672 and 3679. VA does not view this change as substantive in nature but, rather, is making the change to clarify existing authority based on stakeholder feedback.

Additionally, VA proposes to amend 38 CFR 21.4259 to include the new phrasing for the denial of an application in proposed § 21.4250(b). VA proposes to amend §

21.4259(a) to explicitly state that an SAA may deny an application when the program either fails to satisfy any approval criterion or when the program is outside the SAA's jurisdiction. VA proposes to include, in proposed § 21.4259(a)(3) and (b), denial of an application for approval in the list of reasons for which an SAA must send a notification of decision to the educational institution and VA, respectively. Additionally, VA proposes to amend § 21.4259(b) to explicitly state that the notification to VA must set forth the reasons for such denial, suspension, or withdrawal. Under 38 U.S.C. 3672(a) an SAA must notify VA of its reasons for disapproval of a previously approved course. VA intends to explicitly apply the requirement under 38 U.S.C. 3672(a) to every SAA action that may negatively impact a student's ability to use GI Bill benefits at a particular educational institution. The language requiring the SAA to set forth reasons for adverse approval action is being moved from current § 21.4250(b)(2), which contains vital notification requirements, to proposed § 21.4259(a)(3) and (b) because it appears to better fit with proposed § 21.4259. We propose to include a cross-reference in § 21.4250(b)(2) to indicate that requirements for an SAA's notice of denial, suspension, or withdrawal is covered in § 21.4259(a)(3) and (b). VA further proposes to relocate the sentence, "It is incumbent upon the State approving agency to determine the conduct of courses and to take immediate appropriate action in each case in which it is found that the conduct of a course in any manner fails to comply with the requirements for approval," in a revised form, from current § 21.4259(a)(3) to proposed § 21.4259(a)(2) as a matter of style, not to have any substantive effect.

Lastly, VA would remove the term "disapproval" from § 21.4259 and replace it with the terms "Denial of an Application for Approval" and "Withdrawal of Approval" as applicable. VA interprets, as it always had, its authority to disapprove courses in 38 U.S.C. 3679 as including authority to deny applications for approval, suspend approvals, and withdraw approvals. This non-substantive change would provide

consistency in the terminology used throughout proposed § 21.4259 and proposed § 21.4250(b).

In the interest of properly assisting SAAs in effectively and efficiently administering VA education benefits approval standards and resolve confusion expressed by some SAAs in recent years regarding how to respond to educational institutions seeking approval of strictly online distance learning training courses, it is necessary for VA to make these regulatory amendments. Additionally, these amendments would help ensure course approvals or denials are made by the correct SAA and to provide appropriate guidance regarding the denial of an application for approval.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). VA has determined there are no small entities involved with the approval of online distance learning courses or any involvement with administering VA's educational benefits. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

Although this action contains provisions constituting collections of information at 38 CFR 21.4250 and 21.4259 under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), no new or proposed revised collections of information are associated with this proposed rule. The information collection requirements for §§ 21.4250 and 21.4259 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control number 2900-0051.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.027, Post-9/11 Veterans Educational Assistance; 64.028, Post-9/11 Veterans Educational Assistance; 64.032, Montgomery GI Bill Selected Reserve; Reserve Educational Assistance Program; 64.117, Survivors and Dependents Educational Assistance; 64.120, Post-Vietnam Era Veterans' Educational Assistance; 64.124, All-Volunteer Force Educational Assistance.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Defense Department, Education, Employment, Grant programs-education, Grant programs-veterans, Health care, Loan programs-education, Loan programs-veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, and Vocational rehabilitation.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved this document on September 14, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Jeffrey M. Martin,

Assistant Director,

Office of Regulation Policy & Management,

Office of the Secretary,

Department of Veterans Affairs.

For the reasons stated in the preamble, VA proposes to amend 38 CFR part 21 as set forth below:

PART 21—VOCATIONAL REHABILITATION AND EDUCATION

Subpart D – Administration of Educational Assistance Programs

1. The authority citation for part 21, subpart D continues to read as follows:

Authority: 10 U.S.C. 2141 note, ch. 1606; 38 U.S.C. 501(a), chs. 30, 32, 33, 34, 35, 36, and as noted in specific sections.

2. Amend § 21.4250 by revising paragraphs (a)(2) and (3), revising in paragraph (b) the introductory text following the paragraph heading, revising paragraph (b)(2), and removing paragraph (b)(3) to read as follows:

§ 21.4250 Course and licensing and certification test approval; jurisdiction and notices.

(a) * * *

* * * *

(2) If an educational institution with a main campus in a State offers a resident course not located in the same State, only the State approving agency for the State where the educational institution's main campus is located may approve the course for VA training. If the State approving agency chooses to approve a resident course (other than a flight course) not leading to a standard college degree, it must also approve the class schedules of that course.

(3) If an educational institution offers a course solely by independent study as defined in § 21.4267(b)(1), which includes online distance learning, solely by

correspondence, as addressed in § 21.4256, or solely by a combination of independent study and correspondence, only the State approving agency for the State where the educational institution's main campus is located may approve the course for VA training.

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(b) ***. State approving agencies may make four types of decisions: Approval of an Application for Approval; Denial of an Application for Approval; Suspension of Approval; and Withdrawal of Approval.

(1) * * *

(2) *Notice of denial, suspension, or withdrawal.* See § 21.4259(a)(3) and (b).

* * * * *

3. Revise § 21.4259 to read as follows:

§ 21.4259 Denial of an Application for Approval, Suspension of Approval, or Withdrawal of Approval.

(a)(1) A State approving agency may deny an application for approval of any course, or licensing or certification test, after reviewing the application and determining that either:

(i) The course, or licensing or certification test, fails to meet any of the requirements for approval; or

(ii) The State approving agency lacks jurisdiction under § 21.4250.

(2) With respect to any approved course, or licensing or certification test, it is incumbent upon the State approving agency to determine whether the course continues to comply with the requirements for approval and to take immediate appropriate action in each case in which the evidence of record establishes that the conduct of a course fails to comply with the requirements for approval. If so found, the State approving agency:

(i) Will suspend the approval of a course for new enrollments, or approval of a licensing or certification test, for a period not to exceed 60 days to allow the institution to correct any deficiencies; or

(ii) Will immediately withdraw the approval of the course, or licensing or certification test, if any of the requirements for approval that are not being met cannot be corrected within a period of 60 days.

(3) Upon denying an application for approval, or suspending or withdrawing an approval, the State approving agency will notify the educational institution by certified or registered letter with a return receipt secured (38 U.S.C. 3679). The notification will set forth the reasons for such denial, suspension, or withdrawal.

(b) Each State approving agency will immediately notify VA of each course, or licensing or certification test, for which it has denied an application for approval, or suspended or withdrawn the approval, and set forth the reasons for such action.

(c) VA will deny an application for approval, or suspend or withdraw the approval, of courses, or licensing or certification tests, under conditions specified in paragraph (a) of this section where it functions for the State approving agency. See § 21.4150(c).

(d) VA will immediately notify the respective State approving agency, if applicable, in each case VA suspends or withdraws approval of any school under 38 U.S.C. chapter 31.

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900-0051)

(Authority: 38 U.S.C. 3672, 3679, 3689)

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